

To Make a Commitment

Maximilian Steinbeis Sa 20 Mai 2017

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Dear Friends of Verfassungsblog,

One of the most vexing aspects of constitutional law is that it is so well suited to dogmatize political preferences. Gay marriage – or rather: marriage for all, as the French ingeniously put it – is an example. Even the most rigidly conservative parts of the political spectrum in Germany are hard pressed nowadays to come up with a halfway presentable argument why same-sex couples should not have access to that thoroughly conservative institution of reciprocal legally binding responsibility for each other that is marriage. They are relieved from the burden of justification, however, when they can point to the constitution and say: Well, no matter what we want or do not want, we can't anyway; it would be unconstitutional, as under the Grundgesetz, Art. 6, marriage and family enjoy special protection by the state, and "marriage" is understood both by the framers and the constitutional court as a bond between man and woman who produce offspring in a "natural" way, which can not be redefined by a simple majority. It's not us, it's the constitution! Get over it!

Which we won't, of course. We still insist on getting an explanation why special protection for offspring-producing (or not) straight couples conceptually excludes special protection for offspring-raising (or not) gay couples. That our constitution of all things should compel us to discriminate against a vulnerable minority is obviously not a self-evident point to make. There could be a very fruitful debate on this matter, particularly on questions of constitutional law.

That is, as far as the legislator is concerned, unlikely to happen anytime soon. Several draft laws have been tabled in the German *Bundestag* during this legislature, one by the Greens, one by the Left, and another by the States (*Bundesrat*), to finally open marriage for all regardless of their sex. These drafts have been stewing on the legislative back-burner literally for years now. Time and again the coalition majority postponed the vote on these drafts in the Committee on Legal Affairs, the sympathetic Social Democrats respecting the qualms of their more reluctant conservative coalition partners, until now the end of the legislative period is approaching with the general elections in September at which point all unresolved issues of the ongoing legislature will be moot anyway.

Is that legal? This is in fact another quite interesting constitutional question. The Greens have filed an urgency motion at the Federal Constitutional Court to order the Legal Affairs Committee to finally put these three draft laws up for vote at its last session on June 30 at the latest. Whether or not the FCC will comply with that wish depends on whether or not a minority group in Parliament has a right to have its proposals voted upon in the first place – which is not entirely obvious either. Article 76 (1) of the Grundgesetz merely states that legislative proposals are introduced "from the midst of the *Bundestag*". There exists a FCC decision from 65 years ago, one of its very earliest ones, in which the Court, referring to an essay by the famous Weimar *Staatsrechtslehrer* Heinrich Triepel from 1920, stated that the initiator of a legislative proposal is entitled to have his proposal discussed and decided upon in Parliament "by the nature of the legislative initiative". But this was a long time ago, and I wonder to which extent the Court will find it expedient to erect a constitutional obligation of the *Bundestag* towards its minorities not to dawdle about, monitoring its pace with a stopwatch in its hand.

In short, this will be a rather exciting case, unless Karlsruhe finds the Greens' motion inadmissible for some reason, of course.

Singapore, Minsk and St. Nicholas

There has been another interesting chamber decision by the Federal Constitutional Court. The question was if a gravely ill person can invoke the constitution to have social security pay for a not officially licensed therapy. On 6 December 2005, the day when German kids find their stockings stuffed with sweets by the benevolent St.

Nicholas, the FCC had raised the hopes of terminally ill patients in a decision that has been known among social lawyers by the name "St. Nicholas decision" ever since. STEFAN HUSTER examines how the FCC [deals with the expectations of patients in a case of non-mortal illness](#).

The most momentous court decision this week was certainly the opinion of the European Court of Justice on the EU Free Trade Agreement with Singapore. In this opinion, the Court clarified in which cases the national legislatures of Member States need to be involved in the ratification of free-trade agreements. According to DANIEL SARMIENTO, the Court acted in a remarkably shrewd way in [defending its authority against the competition of investor-state dispute resolution bodies](#) and, additionally, has included in its opinion a special little treat for Theresa May...

The Court of the Eurasian Union in Minsk has received little attention in the West, so far. This could change after the Court in a recent judgment has declared the Union competition law to have ["direct effect" as a legal order towards the law of member states](#), as reported by PAUL KALINICHENKO, calling to mind the legendary *Van Gend & Loos* decision by the CJEU back in the day.

Drawing comparisons is always a tricky task. This is especially true of the attempts of the Turkish government to defend their autocratic constitutional reform through alleged parallels to Turkey's own constitutional history and to other constitutional systems. CEM TECIMER shows why [these attempts are misguided and and coins for them the word "abusive comparativism"](#).

This week, the endeavour by Italian and German international lawyers to engage in an exercise of academic diplomacy in the Villa Vigoni and to loosen the Nazi crime compensation knot, organized by the Heidelberg Max Planck Institute and [documented by us](#), came to a successful conclusion. GIOVANNI BOGGERO, ANTJE VON UNGERN-STERMBERG, KARIN OELLERS-FRAHM and FILIPPO FONTANELLI summarize the discussed solutions, and CHRISTIAN TOMUSCHAT explains in his keynote speech why there is hope.

Elsewhere

This was the week when the impeachment of Donald Trump began to look like a not altogether unviable option. There have been too many twists and escalations to list all great pieces written about them this week; just go to [Lawfare](#), [Just Security](#) and [Take Care](#) and find sufficient amounts of legal and political analysis to keep you occupied for days and weeks. As regards the prospect of a 25th amendment procedure ("*unfit for office*"): JAMAL GREENE and DAVID POST argue for it, ERIC POSNER against. JACK BALKIN proposes a new term "[constitutional rot](#)" for the whole spectacle for which the concept of constitutional crisis is not (yet) quite appropriate.

MARK ELLIOTT [reviews the constitutional aspects of the Tory's manifesto for the general elections](#). There is no lack of constitutionally pertinent issues in the UK: English votes for English laws, Scotland and devolution, fundamental rights and the ECHR, House of Lords. The conservatives, though, are rather conservative about these matters and refrain from promising too much change.

ALBERT SÁNCHEZ-GRAELLS [accuses the EU Commission to breach European law](#) when it plans to treat the British side in the Brexit negotiations as if it had already withdrawn from the EU.

ANASTASIA KARATZIA reports on a decision of the European General Court which clarifies the legal [requirements for European Citizens' Initiatives](#) on the occasion of the "Stop TTIP" initiative.

LAURENS ANKERSMIT expects that the CJEU's opinion on the Singapore Free Trade Agreement paves the way for a further opinion about the [compatibility of investor-state dispute resolution with EU law](#). ANTHEA ROBERTS suspects that under the cover of the CJEU ruling other countries will [feel free to vent their frustration about investor protection arbitration without fearing stigma](#).

TATJANA KHRAMOVA examines how the recent case law of the [Russian Constitutional Court shields Russia from its obligations under the European Convention on Human Rights](#).

CAROLINA CERDA-GUZMAN looks back on the failed attempt of the hard-nosed chavist Supreme Court judges of [Venezuela to disembowel the parliament](#) in favor of the autocrat Nicolás Maduro: politically not a surprising verdict, but legally all the more and no less than a judicial Coup d'Etat by itself. (Which should be a warning to all who believe that constitutional judges are always the good guys.)

So much for this week. In the next we expect an interesting verdict from Karlsruhe about government warnings against right-wing populists/political competitors, we will take a look on the way the Austrian Micro-Macron Sebastian Kurz redefines the concept of a political party, and we will further examine the ramifications of the Singapore opinion. In the meantime, all the best and take care,

Max Steinbeis

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